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IN THE

Supreme Court of the United States

OCTOBER TERM 1950.

No. 700

ELECTRIC BOND AND SHARE COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, WILLIAM F. STUBERFIELD *et al.*, ALFRED B. CORNELL *et al.*, and JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Your petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit to bring up to this Court a case pending in the Court of Appeals before judgment is given in that Court and to review those portions of an order of the United States District Court for the Southern District of New York from which your petitioner appealed to such Court of Appeals. The order of the District Court approved and directed the enforcement of Amended Plan II-B, filed by your petitioner with the Securities and Exchange Commission (the Commission) pursuant to Section 11(e) of the Public Utility Holding Company Act of 1935 with the reservation by your petitioner of the right to contest the propriety of such plan and to object to the approval and enforcement thereof.

Opinion Below.

There is no opinion of the Court of Appeals since this petition is filed before judgment has been given by that Court.

The opinion of the District Court (R. 4) is reported in *In re* Electric Bond & Share Co., 95 F. Supp. 492 (S. D. N. Y., 1951).

The findings and opinion of the Commission have not been officially reported but are set forth in the Commission's Holding Company Act Release No. 9980, dated July 28, 1950 (R. 36).

Jurisdiction.

The order of the District Court, a part of which is sought to be reviewed, was entered on March 2, 1951 (R. 16). The jurisdiction of this Court is invoked under Section 1254 of the 1948 revised Judicial Code, Title 28 U. S. Code, as amended, made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 835, 15 U. S. C. §79y.

Statute Involved.

The statute involved is Section 11(e) of the Public Utility Holding Company Act (the Act). This section is reproduced in the Appendix hereto (p. A-1).

Questions Presented.

1. In the light of the opinions of this Court in the *Engineers** and *Otis*** cases, does the "fair and equitable" standard of Section 11(e) of the Act permit pre-

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* *S. E. C.* v. *Central-Illinois Corp.*, 338 U. S. 96 (1949).

** *Otis & Co.* v. *S. E. C.*, 323 U. S. 624 (1945).

ferred stockholders of a company subject to Section 11 to obtain, in retirement of their stock as part of a liquidation or capital distribution, an amount which exceeds the voluntary "liquidation" preference of such stock under the company's charter, where the "liquidation" provisions of the company's charter could, and also probably would, have been brought into play by the company apart from Section 11 of the Act?

2. Did the Commission, in connection with its determination of the investment value of the $6 preferred stock of your petitioner, rely on proper and consistent assumptions as to the presence or absence of the impact of Section 11 of the Act on the pertinent transactions involved, in accordance with the opinion of this Court in the *Engineers* case?

3. Were the stock yield levels employed by the Commission as standards in reaching its investment value appraisals of the $6 preferred stock of your petitioner abnormally low yield levels of a transient nature within the prohibition of this Court's opinion in the *Engineers* case?

4. Did the Commission follow proper legal standards in obliging your petitioner to pay on its $6 preferred stock, with respect to which payment of $10 a share above charter "liquidation" preference has been directed, an additional amount as interest on the $10 per share payment, and, if so, is the rate of interest which your petitioner has been directed to pay substantially excessive?

Statement.

Description of Amended Plan II-B and Proceedings Relating Thereto.

This case involves the question of the fairness of Amended Plan II-B filed pursuant to Section 11(e) of the Act by your petitioner (Bond and Share) with the Commission. As originally filed, Plan II-B provided that Bond and Share would make no further payments in retirement of its $6 and $5 preferred stocks in addition to payments theretofore made of $30 and $70 per share—an aggregate of $100 in all and representing the "liquidation" value of the preferred stocks pursuant to the terms of the Bond and Share charter—which had been made by Bond and Share pursuant to previous Section 11(e) plans theretofore approved by the Commission and District Court.

The Commission approved that portion of Plan II-B which provided for no further payment with respect to the $5 preferred stock, but directed that Bond and Share pay $10 per share with respect to the $6 preferred stock, together with "compensation for delay in payment", or interest, at the rate of 5.45% per annum on the $10 per share payment from March 6, 1947, to the date of payment. Pursuant to a commitment contained in one of its previously approved plans, Bond and Share thereafter filed amendments to its Plan II-B providing for such payment with respect to the $6 preferred stock, but reserving its right to object to such amendments before the District Court and to appeal from any order of any court approving Amended Plan II-B.

Thereafter the District Court entered an order approving Amended Plan II-B, over the objections of Bond and Share to that part of such Plan which directed a further payment to be made with respect to the $6 preferred stock.

Bond and Share seeks review by this petition of that order only in so far as it approved the part of the Plan just mentioned.

The amount presently involved exceeds $10,250,000, of which more than $1,850,000 is represented by interest alone.

Description and Brief History of Bond and Share.

Bond and Share, a registered holding company under the Act, is a New York corporation (R. 39). It neither owns nor operates physical properties, all of its assets (other than current assets) being debt and stock securities of other companies.

When Bond and Share registered under the Act in 1938, it was the top holding company in the largest public utility holding company system in the world. At that time Bond and Share controlled about 120 domestic subsidiaries operating in 33 states and about 110 subsidiaries operating in 13 foreign countries with combined assets of nearly $3,500,000,000.* These interests were owned primarily through the following five major subsidiary holding companies, all of which owned securities of public utility holding or operating companies:**

American & Foreign Power Company Inc. (Foreign Power), the operating subsidiaries of which are all located in foreign countries;

American Gas and Electric Company (American Gas);

American Power & Light Company (American);

Electric Power & Light Corporation (Electric);

National Power & Light Company (National).

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* 15th Annual Report of the Commission for the fiscal year ended June 30, 1949, p. 99.

** Plan II-B, Appendix A (R. 186-91).

In addition, Bond and Share owned a large direct interest in United Gas Corporation (United Gas), a subsidiary of Electric, and all the securities of Ebasco Services Incorporated (Ebasco), a wholly owned service company, together with miscellaneous investments.*

Each of the five subholding companies was capitalized with debt or preferred stock, or with debt and preferred stock, as well as common stock. The securities owned by Bond and Share consisted mostly of junior securities of the subholding companies.* The operating companies, in addition to the subholding companies, also had debt and preferred stocks outstanding in the hands of the public. Thus Bond and Share's position was primarily that of the holder of equities junior to many layers of senior securities.**

The depression of the early 1930's struck with full force Bond and Share's attenuated equity in its subsidiary companies and the effect of the depression on Bond and Share's earnings was magnified by other economic developments (R. 385-90). Further substantial reduction in earnings resulted from the impact of the Act on the Bond and Share system.

In 1940 the Commission initiated proceedings against Bond and Share and certain of its subsidiary companies under Sections 11(b)(1) and 11(b)(2) of the Act. As a result of these proceedings the Commission directed the dissolution of Electric, American and National. National was substantially liquidated in 1946, Electric was dissolved in 1949 and the American compliance plan was consummated in 1950, resulting in a substantial liquidation of that company.

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* Plan II-B, Appendix A (R. 188).

** *Ibid.*

Under the Act, Bond and Share has been required to dispose of the major portion of the securities which it has received as a result of the consummation of the compliance programs of these three subholding companies. Many of such disposals have already been effected. Also, Bond and Share has disposed of all of its holdings in American Gas. Foreign Power, representing Bond and Share's largest investment, is still in Section 11(e) reorganization proceedings before the Commission.

United Gas, formerly Bond and Share's second largest investment, was reorganized under Section 11(e) of the Act pursuant to which Bond and Share in November 1944 received approximately $44,000,000 in cash for its entire interest in United Gas, which cash could not be profitably invested because of the restrictions of the Act.*

As a result of the impact of the Act the Bond and Share system had been severely contracted by July 1945 when it filed with the Commission its Section 11(e) plans (hereinafter more fully described) for compliance with the Act. Bond and Share's net income had decreased from approximately $42,000,000 at the end of 1930 to approximately $4,600,000 at the end of 1944. The earnings coverage for its preferred stock dividend requirements had fallen from 5.8 times at the end of 1930 to .72 times at the end of 1944. The substantial decline in earnings was continuing in the year 1945.**

Bond and Share's Position in July 1945.

By July 1945, due to the combined effect on the Bond and Share system of the impact of the Act and the economic

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* *United Gas Corp.*, 16 SEC 531, H. C. A. R. 5271 (Sept., 1944).

** Plan II-B, Table A (R. 174).

developments above-mentioned, Bond and Share found itself in the following position:

1. Its earnings had been reduced so that for more than the past three years it had not earned its preferred stock dividend requirements.

2. Its income from United Gas, its second largest investment, had been wiped out in connection with the reorganization of that company and Bond and Share held $44,000,000 in cash which it received as a result of such reorganization, with no profitable place to invest such funds because of the restrictions of the Act.

3. Its system had already been substantially contracted under the Act and it was apparent that further liquidation of the system would be necessary to comply with the Act.

Bond and Share's Plans for Compliance with the Act.

On July 25, 1945, Bond and Share filed with the Commission its three plans under Section 11(e) for compliance with the Act. Plan I provided that, as the initial step in the retirement of both its $6 and $5 preferred stocks, Bond and Share would make a cash distribution of capital to all its preferred stockholders in the amount of $30 per share and that the rights of such stockholders would be appropriately modified. After approval by the Commission and the District Court for the Southern District of New York this Plan was consummated in November 1945. In its Findings and Opinion approving the Plan the Commission found that the retirement of the preferred stocks was necessary to effectuate Section 11(b) of the Act.*

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* *Electric Bond and Share Co.*, SEC , H. C. A. R. 6121 (Oct., 1945).

Plan II, which originally provided for the completion of the retirement of the preferred stocks, principally by the distribution to preferred stockholders of certain securities, was, in the interest of expedition, amended by the filing of Plan II-A providing for the payment of cash to the preferred stockholders.* This Plan provided, among other things, for the completion of the retirement of the preferred stocks by payment to the holders thereof of a cash distribution of capital of $70 per share, plus the amount of any accumulated dividends, and also by issuing to them a certificate evidencing their right to receive such additional amount, if any, as might be ultimately awarded to them by the Commission or any appropriate court.

Thus Plans I and II-A resulted, among other things, in distributing capital to the preferred stockholders in the aggregate amount of $100 per share, plus accumulated dividends. This was the amount that preferred stockholders were entitled to receive under the provisions of

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* Experience proved that a cash plan, like Plan II-A, was quicker than a plan providing for an exchange of securities, like Plan II (R. 366).

Bond and Share's management would not have filed a plan, like Plan II-A, providing for the payment of as much as $100 per share for the $5 preferred stock on an investment value basis. The provision for payment of that amount was based on other considerations, both legal and practical (Transcript, unprinted, pp. 493-500).

Moreover, the fact that Plan II offered a slightly larger security package to the $6 preferred stock than it did to the $5 preferred stock of Bond and Share merely meant that in the management's opinion the $5 preferred stock was worth less than $100 per share—not that the $6 preferred stock was worth more (Transcript, unprinted, p. 495). The reason why Plan II offered the slightly larger security package to the $6 preferred stock was that when that plan was filed (in 1945) the "security", as opposed to the "cash", plans were in vogue; the fairness of such "security" plans was measured primarily by a comparison of earnings on the securities being surrendered and received, respectively, and charter liquidation provisions were not given controlling weight by the Commission or courts as they were in most cases involving "cash" plans.

Bond and Share's charter in the event of any liquidation or any distribution of capital, whether voluntary or involuntary (R. 399-400).

Plan II-A, after approval by the Commission* and the District Court,** was consummated by payment to the preferred stockholders on March 6, 1947. Thereafter Bond and Share filed Plan II-B as described above.

In addition to issuing the order under Section 11(e) approving Plan II-A, the Commission issued an order under Section 11(b)(2) directing that Bond and Share eliminate its preferred stocks from its capital structure as being repugnant to that Section.***

Plan III of Bond and Share is not here relevant but provides primarily for the further disposal of Bond and Share's holdings of utility securities.

Thus the Bond and Share public utility holding company system is, pursuant to the Act, in practical effect being liquidated so that the capital of the preferred stockholders could no longer be employed in the business. With the remainder of the Company's capital being drastically shrunk, the business of Bond and Share is being transformed into an enterprise which to a large extent is expected to be an investment company of a specialized nature. The result of this liquidation and transforma-

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* *Electric Bond and Share Co.*, SEC , H. C. A. R. 6879-1 (Sept., 1946).

** The opinion of the District Court (Judge Leibell) written in connection with this order is reported at 73 F. Supp. 426 and reprinted at R. 258.

Judge Leibell, in his opinion approving Plan II-A, stated that he regarded as premature (and consequently that he did not intend to decide) the question of whether the preferred stockholders were entitled to any amount in excess of $100 per share, plus accumulated dividends, representing the aggregate amount they received pursuant to Plans I and II-A. Therefore, none of the present issues were decided by Judge Leibell (R. 294).

*** *Electric Bond and Share Co.*, SEC , H. C. A. R. 6879-2(a) (Sept., 1946).

tion is graphically shown by Chart I (Appendix hereto) illustrating the nature and size of the Bond and Share enterprise before and after proposed compliance with the Act. The extent of the liquidation that had taken place at the time of the completion of the preferred stock retirement is shown by the fact that upon the consummation of its Plan II-A, Bond and Share had disposed of investments with a ledger value of over $200,000,000 (or nearly 40% of the ledger value of investments held at November 30, 1935 or subsequently acquired), in addition to reducing its net current assets by $23,000,000 and its capital stock liability from over $171,000,000 to about $26,000,000 (R. 383).

Reasons for Granting the Writ.

I.

This case involves questions of substantial importance in connection with the proper administration and interpretation of the Public Utility Holding Company Act. It is respectfully submitted that the public interest will be promoted by prompt settlement in this Court of such questions. There are presently pending in different fora at least three cases, including the present proceeding, in which the primary legal issue is similar, if not identical. In two of these cases petitions for writs of certiorari have been filed in this Court, including the present case. The aggregate amount in controversy in the three cases approximates $13,000,000.

In addition to the present proceeding the cases just mentioned are the *Federal Light & Traction Company* case, which has recently been decided by the Court of Appeals

for the Second Circuit*, and the *American Water Works and Electric Company* case,** which is pending undecided before the Commission. A petition for a writ of certiorari is being filed with this Court in the *Federal* case on or about the same day that your petitioner files the present petition.*** The primary question of law in the *Federal* case and the present case is substantially the same. Your petitioner respectfully requests this Court, under its Rule 39, to grant Bond and Share's petition before judgment is given by the Court of Appeals for the Second Circuit, the same Court that rendered the decision in the *Federal* case, in order that the common question of law in the two cases may be conclusively settled at one time.† This Court has frequently so held.‡

The common question of law involves the effect which should be given to charter "liquidation" provisions upon the retirement of preferred stocks of companies subject to the Act in situations where, although such retirement was effected as a part of a liquidation or distribution

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* *In the Matter of Federal Light & Traction Co.* SEC , H. C. A. R. 9981 (July, 1950); aff'd *sub nom. Federal Liquidating Corp.* v. *S. E. C.*, F. (2d) (C. A. 2, 1951), C. C. H. Fed. Sec. Serv. ¶90, 502, Mar. 16, 1951.

** *In the Matter of West Penn Electric Co., et al.; American Water Works and Electric Co., Inc., et al.*, Commission File Nos. 54-142 and 59-84.

*** (Sub nom. *Federal Liquidating Corporation, Petitioner,* v. *Securities and Exchange Commission, Respondent).*

† The Commission recognized that a common question of law existed in the *Federal* case and in the present case by issuing its orders in the two cases on the same day (June 19, 1950) after having had both cases under advisement for a period of over two years.

‡ *White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 298-9 (1925); *Johnson* v. *U. S. Shipping Board Fleet Corp.*, 280 U. S. 320, 324-5 (1930); *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 411-2, 415 n. 2 (1931); Cf. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 370-1 (1949).

of capital consummated by the company in question in connection with plans filed with the Commission under Section 11(e) of the Act, the liquidation or distribution of capital could have been, and indeed probably would have been, carried out without the aid or compulsion of Section 11.

II.

The Court of Appeals in the *Federal* case has decided a federal question in a way probably in conflict with applicable decisions of this Court or, at the very least, has decided an important question of federal law which has not been, but should be, settled by this Court.

Both Federal and Bond and Share were organized under the laws of New York. In the *Federal* case the company paid its preferred stockholders $100 per share and accumulated dividends (being the amount payable pursuant to the provisions of the charter upon any liquidation, whether voluntary or involuntary) in connection with the liquidation and dissolution of the company after requisite stockholders' vote and pursuant to the provisions of the New York corporation laws, as well as in accordance with a plan filed and approved by the Commission under Section 11(e) of the Act. In the present case, Bond and Share made payment in a like amount to its preferred stockholders as a distribution of capital pursuant to a plan filed and approved by the Commission under Section 11(e) of the Act. This was the amount payable to such stockholders in accordance with the Bond and Share charter upon any liquidation or distribution of capital, whether voluntary or involuntary (R. 399-400). In both cases the preferred stockholders were given, in addition to the cash payment just mentioned, a certificate evidencing any right they might have, as later determined by the Commission or an appropriate court, to

obtain a further cash payment in connection with the retirement of their stock.

In the *Federal* case the company not only *could have* but in fact *did* liquidate under the provisions of its charter and of the New York State corporation laws. In the present case Bond and Share contends that it *could have* (and, also, probably *would have*), effected the distribution of capital, which was carried out pursuant to its Section 11(e) plan, under the provisions of its charter and of the New York State corporation laws without the aid of Section 11 of the Act. It is contended in both cases that the amount provided in the companies' respective charters to be paid to preferred stockholders upon any liquidation or distribution of capital, whether voluntary or involuntary (namely, $100 per share, plus accumulated dividends), marks the upper limit of the payment which such preferred stockholders are entitled to receive.

This contention is entirely consistent with the decisions of this Court in the *Otis* case* and in the *Engineers* case** where the Court decided that *involuntary* charter liquidation provisions were not applicable to preferred stock retirements pursuant to Section 11(e) plans. The principal legal question involved in the present case (and in the *Federal* case) was not presented in either *Otis* or *Engineers*. In the *Otis* case the assets of the company were insufficient to pay the full liquidation claim of the preferred stockholders and leave anything over for the common stockholders who had been allocated about 5% of the assets by the Commission. The preferred stockholders in that case were seeking to establish that the charter provision was matured by the operation of the Act and thus deprive the

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* *Otis & Co.* v. *SEC*, 323 U. S. 624 (1945).

** *S.E.C.* v. *Central-Illinois Corp.*, 338 U. S. 96 (1949).

common stockholders of any participation in the enterprise —a result which could not have been achieved by the preferred stockholders apart from Section 11 of the Act. In holding that the charter liquidation provisions were not applicable, this Court stated in the *Otis* case that:

> ". . . Congress did not intend that its exercise of power to simplify [under Section 11] should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors. . ."*

In the *Engineers* case** the charter provision required the payment of an amount equal to the redemption premium upon voluntary liquidation. Only in case of involuntary liquidation would the preferred stockholders have been limited to $100 per share, plus accumulated dividends. In that case the common stockholders were seeking to mature the provisions of the charter relating to involuntary liquidation—again, as in the *Otis* case, a provision that could not have been matured by action of the stockholders apart from Section 11 of the Act. In this connection the Court said in the *Engineers* case that its decision was based on

> ". . . the fact that Congress in its efforts to achieve a particular economic goal, wished to avoid

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* *Otis & Co.* v. *SEC*, 323 U. S. 624, 638, (1945).

** The Bond and Share preferred stocks were not in any way comparable to the Engineers preferred stocks. The Commission has made no finding that they were comparable, and, therefore, it is unnecessary to develop the point. It should be added, however, that in the *Engineers* case the courts and the Commission both emphasized that the evidence was undisputed, and the company even admitted, that the investment values of the preferred stocks exceeded the redemption values of such stocks. On the contrary, in the instant case Bond and Share has at all times vigorously asserted and, we believe, proved that the investment values of the Bond and Share preferred stocks do not exceed $100 per share.

> shifting investment values from one class of securities to another by maturing contract rights [i.e., liquidation rights] which would not otherwise have matured. . .'"*

Indeed in the *Engineers* case this Court, while recognizing as firmly settled the fact that preferred stockholders were not entitled to receive the amount provided in their charter redemption provisions upon retirement of their stock pursuant to a Section 11(e) plan, stated that the redemption provisions should mark the ceiling of the preferred stockholders' recovery. In this respect the Court said:

> ". . . the Commission did not apply the redemption provision, which, like the involuntary liquidation provision, was inoperative, but held that fairness required that the preferreds be paid no more than the call price, since the company could have called the stock at that price at any time absent the Act."**

If fairness required that the charter redemption value*** marked the ceiling of the preferred stockholders'

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* *SEC* v. *Central-Illinois Corp.*, 338 U. S. 96, 134 (1949).

** *SEC* v. *Central-Illinois Corp.*, 338 U. S. 96, 153-4 (1949).

*** While charter redemption provisions properly form a ceiling for preferred stockholders' claims, an unbroken line of decisions terminating with the decision of this Court in the *Engineers* case has defined the law to the effect that upon retirement of senior securities pursuant to a Section 11(e) plan, the holders of such securities are not entitled to receive their charter redemption value as a matter of contract right.

Cases to this effect include the following: *The United Light and Power Co.*, 10 SEC 1215, H. C. A. R. 3345 (Feb., 1942), aff'd *sub. nom. New York Trust Co.* v. *S.E.C.*, 131 F. (2d) 274 (C. A. 2, 1942), cert. denied 318 U. S. 786 (1943); *The Laclede Gas Light Co.*, 16 SEC 26, H. C. A. R. 5062 (May, 1944), plan approved and enforced 57 F. Supp. 997 (E. D. Mo., 1944), aff'd *sub. nom. Massachusetts Mutual Life Insurance Co.* v. *SEC*, 151 F. (2d) 424 (C. A. 8, 1945), cert. denied 327 U. S. 795 (1946).

claims in the *Engineers* case, fairness equally requires that the charter liquidation value in the *Federal* case and the charter distribution of capital value in the present case constitute the upper limit of the preferred stockholders' claims, since Federal could have liquidated (and in fact did liquidate) and Bond and Share could have (and probably would have) made a distribution of capital without the benefit of the Act.

If the rationale of the statement of this Court in the *Engineers* case (last quoted above) is not to be applied to situations where holding companies could have liquidated or distributed capital pursuant to their charter provisions apart from the Act, the result would be to permit the impact of the Act to shift values from common stockholders to preferred stockholders which rightfully belong to the common stockholders and would be capable of being realized by them apart from the Act. Common stockholders would be obliged to pay more as a result of the Act than they need pay apart from the Act. Common stockholders who could, if the liquidation of their corporation were desirable in a business context, liquidate and pay preferred stocks off at $100 per share, plus accumulated dividends, would find that under the Act they could be forced into an undesired liquidation and be forced to pay a premium to preferred stockholders for the privilege of paying them off in liquidation, just as if they could continue to use the money in a going business. Such an interpretation of the Act is not only essentially unjust but is wholly inconsistent with the fundamental premise of the *Engineers* and *Otis* cases which is that the impact of the Act should not result in a shifting of values from one class of securities to another.

The Court of Appeals in the *Federal* case, however, affirmed the decision of the Commission awarding to the

preferred stockholders $10 per share plus interest, in addition to the $100 per share plus accumulated dividends provided in the charter to be paid to such stockholders upon liquidation of the company. The District Court in the present case also affirmed a similar direction of the Commission. These decisions of the Court of Appeals and the District Court are in conflict with the above-quoted statements of this Court; or, at the very least, those Courts decided an important question which has not been, but should be, definitely settled by this Court.

III.

The *Federal* case and the present case also involved another important question of federal law which has not been, but should be, settled by this Court. There were impelling business reasons for the liquidation of the company effected in the *Federal* case and the distribution of capital made by Bond and Share in the present case, under the circumstances in which those companies found themselves at the time that such liquidation and distribution of capital, respectively, were carried out. It is conceded in the present case that the business reasons for the distributions of capital in connection with the retirement of the preferred stocks arose out of a situation in which Bond and Share was placed, in part at least, by reason of the previous impact of Section 11 of the Act on Bond and Share and its subsidiary companies. A similar situation existed in the *El Paso* case,* however, and it is our understanding that the opinion of this Court in the *Engineers* case indi-

* *El Paso Electric Co.*, 17 SEC 659, H. C. A. R. 5499 (Dec., 1944).

cated that the Court did not intend that the doctrine of the *El Paso* case should be overruled by this Court.*

In the *El Paso* case the Commission decided that the preferred stockholders were limited, in the retirement of their stock, to the $100 per share plus accumulated dividends provided by their charter in the event of a liquidation, voluntary or involuntary. In both the *Federal* case and the present case the Commission overruled its determination in the *El Paso* case. It is respectfully submitted that this Court should settle the important conflict of law presented by these cases.

ARGUMENT.

Summary of Argument.

Since Bond and Share, under the provisions of its charter and of the New York State corporation laws, could have effected a distribution of capital of $100 per share, plus accumulated dividends, to its preferred stockholders, apart from the Act, the claims of the preferred stockholders were limited to the amount of $100 per share, plus accumulated dividends.

Bond and Share not only could have made a distribution of capital to its preferred stockholders apart from the Act,

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* *SEC* v. *Central Illinois Corp.*, 338 U. S. 96, 159 (1949), footnote 10, reading as follows: "Commissioner Caffrey thought the liquidation preference applicable for a reason irrelevant here. See *El Paso Electric Co.*, Holding Company Act Release 5499".

We are not overlooking the fact that footnote 10 just quoted appears in the Appendix to this Court's opinion in the *Engineers* case and that the Court stated (p. 155) that "This Appendix is merely a summary of Commission decisions and does not purport to declare any rulings of law." Nevertheless, the footnote merely confirms our understanding gathered from the main portion of this Court's opinion.

as set forth above, but under the circumstances existing in the middle of 1945, when Bond and Share filed its plans with the Commission for compliance with the Act, would have been impelled by business considerations to make such a distribution of capital in the amount of $100 per share, plus accumulated dividends, even if it had not been compelled to do so by the impact of the Act. This constitutes an additional reason for limiting the claims of the preferred stockholders to the amount of the distribution of capital charter preference.

The Commission and the District Court misapplied the legal principles relating to the impact of the Act on Bond and Share and its subsidiary companies in connection with the Commission's finding of investment value of the preferred stocks, with the result that the Commission did not appraise the investment value of the preferred stocks of Bond and Share as they actually existed at the time of their retirement.

The Commission and the District Court violated the rule of law announced by this Court in the *Engineers* case in that the Commission, as affirmed by the District Court, based its investment value appraisal of the Bond and Share preferred stocks on a period of abnormally high market values of a transient nature.

The Commission and the District Court erred as a matter of law in directing that Bond and Share must pay with respect to its formerly outstanding $6 preferred stock "compensation for delay in payment", or interest, at the annual rate of 5.45% from March 6, 1947 to the date of payment.

POINT I.

Since Bond and Share could have effected a distribution of capital of $100 per share, plus accumulated dividends, to its preferred stockholders apart from the Act, that amount should mark the ceiling of the claims of those stockholders.

We have fully stated hereinabove* our contention that, under the express language of the opinion of this Court in the *Engineers* case, fairness requires that payment to the preferred stockholders should in no event exceed $100 per share, plus accumulated dividends, and we need not repeat such contention here.

POINT II.

Under the circumstances existing in the middle of 1945 Bond and Share would probably have made a distribution of capital of $100 per share in retirement of its preferred stocks even if Section 11 of the Act had not compelled such retirement.

In July, 1945 when Bond and Share filed its compliance plans, the company was impelled by economic pressure under then existing conditions, concededly brought about to a large extent by the impact of the Act during the earlier years, to retire its preferred stocks by making a distribution of capital of $100 per share to the holders of such stocks (R. 379-80), together with a related capital distribution to its common stockholders represented by the offer to them at a discount in price of Bond and Share's

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* At pages 13-18.

holdings in American Gas and Pennsylvania Power & Light Company (Pennsylvania) (R. 46, 299).

The District Court did not deal with this point, having decided the charter question as a matter of interpretation of the provisions of the charter as explained hereafter under Point III. The Commission, however, found that Section 11 called for the elimination of the Bond and Share preferred stocks, and that a substantial portion of the funds used in the retirement of such stocks emanated from a series of events impelled by Section 11, and, consequently, that the question of whether business judgment would have dictated elimination of the preferred stocks ceased to be relevant (R. 54).

We agree with the Commission that the evidence in this case is clear that Bond and Share would not have taken any steps to liquidate, either in whole or in part, and would not have made any distribution of capital to its preferred stockholders as a matter of business judgment if the Act had never affected the affairs of Bond and Share and its subsidiary companies in any way. We contend, however, that since the impact of the Act, plus economic developments, placed Bond and Share in such a situation in the middle of 1945 that it would have been impelled as a matter of business judgment to effect a distribution of capital to its preferred stockholders of $100 per share, as well as to carry out a capital distribution to its common stockholders as stated above, and since Bond and Share could have effected such distributions of capital without the aid of Section 11 of the Act, the preferred stockholders' claims cannot exceed $100 per share, plus accumulated dividends, under the Bond and Share charter provisions.*

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* We need not repeat our discussion of the *El Paso* case hereinabove at pages 18-19.

POINT III.

Bond and Share could have effected a distribution of capital of $100 per share, plus accumulated dividends, to its preferred stockholders apart from the Act.

The Bond and Share charter provides in Section 3(b) that "in the event of any liquidation, dissolution or winding up of the affairs of the Corporation or any distribution of its capital, whether voluntary or involuntary," each holder of the $6 and $5 preferred stocks of Bond and Share "shall be entitled *pari passu* to be paid on each share of such stock held by him the sum of $100", plus the amount of accumulated dividends, and no more (R. 399-400).

Bond and Share's plans for compliance with the Act involve a substantial liquidation of Bond and Share, as shown by Chart I (Appendix hereto). It is not necessary to determine whether the liquidation is complete or partial, since it obviously involved distributions of capital by Bond and Share. In connection with the retirement of the preferred stocks, capital was distributed in the aggregate of $100 per share. In order to obtain the major portion of the funds with which to retire the preferred stocks, Bond and Share offered substantially all of its holdings of two subsidiary companies (American Gas and Pennsylvania) to its stockholders at prices several dollars below the market prices for the American Gas and Pennsylvania securities (R. 200-1). This represented a distribution of capital to the common stockholders to the extent of the value of the rights to purchase the American Gas and Pennsylvania securities which were given to them (R. 299-300).

The phrase "any distribution of its capital" appearing in Section 3(b) of the Bond and Share charter was patently

meant to refer to a transaction other than "any liquidation, dissolution or winding up of the affairs of the Corporation". Otherwise the former phrase would be wholly superfluous and repetitious. It is significant that the Commission in its opinions relating to Plans I, II-A and II-B referred repeatedly to Section 3(b) of Bond and Share's charter as providing for "liquidation or other distribution of capital"*.

Bond and Share could have retired its preferred stocks by making a distribution of capital of $100 per share without using the mechanism of Section 11(e) of the Act.** Just prior to the retirement of the preferred stocks, the common stockholders held over 83% of the total voting power of the preferred and common stockholders. Mr. George G. Walker, President of Bond and Share, testified that in his opinion it would have been possible to obtain a vote of more than 66⅔% of the stock of the Company in favor of making a capital distribution aggregating $100 per share, in retirement of the preferred stocks (R. 380-2).

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* *Electric Bond and Share Co.*, SEC , H. C. A. R. 6121 (Oct., 1945) pp. 2, 9 and H. C. A. R. 6879-1 (Sept., 1946) pp. 6-9, 12; R. 42. Also in *Western Public Service Co.*, 12 SEC 804, 818 H. C. A. R. 4114, (Feb., 1943), Commissioner Healy stated in his concurring opinion:

> "The charter provides that in the case of any liquidation or dissolution or reduction of capital resulting in a distribution of assets, the preferred stockholders are to receive $100 plus accrued dividends * * *. Thus, it seems clear that the intent was that if the enterprise, or any substantial part of it, was abandoned, the capital involved and thereby released, should be returned to those who contributed to it or to those who had succeeded to their rights * * *. Certainly the reduction provision in the charter was pointed to something less than total dissolution or liquidation."

See also *Levin* v. *Pittsburgh United Corp.*, 330 Pa. 457, 470-1, 199 Atl. 332, (1938).

** In this discussion we are considering the distribution of capital involved as being accomplished by one payment of $100 per share since that was the substance of Bond and Share's program of retirement of the preferred stocks.

With such a stockholders' vote a distribution of capital of $100 per share in retirement of the preferred stocks could have been effectuated under the corporation laws of New York in the circumstances of the present case.* Such distribution could have been consummated under Section 36** (providing for the elimination of authorized

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* The section numbers hereinafter referred to in respect of the New York Stock Corporation Law are those in effect in 1945, the time as of which it is appropriate to determine whether Bond and Share could have retired its preferred stocks by a distribution of capital under Section 3(b) of its Charter and the applicable provisions of state law. The numbering and to some extent the form of Sections 36-8 of the New York Stock Corporation Law were changed by amendments effective as of September 1, 1949, the provisions of former Sections 36-8 referred to herein now appearing in Sections 35-8. Such amendments were not effective until more than four years after the filing of Bond and Share's Plans for the retirement of its preferred stocks and in any event would not affect the substance of the arguments made.

** The procedure under Section 36 would be to eliminate the preferred stocks under Section 36(C) (which provides for the elimination of any previously authorized shares) and at the same time reduce Bond and Share's capital under Section 36(G) (which provides for the reduction of capital to a specified amount in connection with any elimination of shares) by the amount of $100 for each share of outstanding stock eliminated, returning the amount of such reduction in capital to the preferred stockholders in accordance with their rights under Section 3(b) of the charter. The required authorization for such a procedure under subsections (C) and (G) of Section 36 is a majority vote of the outstanding shares entitled to vote (Section 37, 3(a)).

We do not believe that the proposed procedure would be a "classification or reclassification" of the preferred shares under Section 36(E), thereby necessitating the approval under Section 37, 3(c), of two-thirds of the preferred stocks (voting as a class) on the ground that such stocks were being "adversely affected" by such classification or reclassification. It must be noted that Section 36(E) restricts a "classification or reclassification" to a transaction to be effected "under this paragraph (E) or paragraph (D) or by a reduction in the par value of such shares under paragraph (B)". It has been seen that the proposed procedure would not be effected under any of such subparagraphs of Section 36. Moreover, even aside from the restrictive clause just quoted, we do not believe that the proposed procedure would involve a "classification or reclassification" which would cause the preferred stocks to be "adversely

shares and the reduction of capital in connection therewith) or Section 105* (providing for dissolution of corporations without judicial proceedings) of the New York Stock Corporation Law.

The District Court held that Bond and Share could not retire its preferred stocks by a distribution of capital under Section 3(b) of its charter, since proper interpretation of the charter provisions would lead to the conclusion that the only method of retiring preferred stocks apart from the Act was pursuant to the redemption provisions found in Section 3(e) of the charter. The Court felt that Section 3(b) contemplated a situation in which there was at least "some payment or distribution to the common", and that adoption of our interpretation of Section 3(b) would render Section 3(e) meaningless.

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affected" by such procedure since the retirement of the preferred stocks would here take place pursuant to a charter provision specifically providing therefor.

* The procedure here would be that Bond and Share would file the requisite certificate of dissolution with the approval of the holders of two-thirds of its outstanding shares of stock entitled to vote, the directors then proceeding under subsection 9 of Section 105, after paying or providing for all corporate obligations, to sell to another corporation formed for the purpose all the corporate assets over and above a sum sufficient to provide each preferred stockholder with $100 per share, plus accumulated dividends, in exchange for all the captial stock of the new corporation. This sale would require the approval of only a majority of the outstanding shares entitled to vote. Thereafter Bond and Share would distribute the cash to its preferred stockholders and the capital stock of the new corporation to the common stockholders, both as distributions under Section 3(b) of the Bond and Share charter. Similar procedure might be followed under Sections 20 and 22 of the New York Stock Corporation Law.

It may be that if a distribution of capital were made to the preferred stockholders under Section 105 of the New York Stock Corporation Law, any dissenting preferred stockholder would have the right of appraisal under that section. In any event it is clear from a review of the applicable authorities relative to appraisal under New York State law that any dissenting stockholder could not have expected his stock to be appraised at an amount greater than his charter "liquidation" claim ($100 per share, plus accumulated dividends).

We believe that the Court misinterpreted Section 3(b) of the charter. As we have stated, a distribution of capital was made to the common stockholders in connection with the retirement of the preferred stocks. This capital distribution was substantial in amount, aggregating in the neighborhood of $9,000,000 (R. 201, 299-300; Transcript, unprinted, p. 592). Moreover, Sections 3(b) and 3(e) of the charter were not meant to be mutually destructive, but to be complementary. The redemption provision, Section 3(e), was meant to apply primarily if Bond and Share desired to refinance its preferred stocks at a lower cost to the company but to continue the capital represented by such stocks, i. e., where there was no shrinkage in capital employed in the business. The distribution of capital provision, Section 3(b), was meant to apply precisely to the type of situation in which Bond and Share found itself in 1945, i. e., where its enterprise was being contracted in size and substantially liquidated so that the company could no longer use its entire invested capital and, therefore, proposed to return to the preferred stockholders the capital which they had originally invested in the enterprise.

Counsel for the Commission has specifically recognized this very distinction in a brief to the Court of Appeals for the Third Circuit in the *Pennsylvania Edison* case.* There Commission counsel stated that a charter "distribution of capital" provision contemplates "at least prima facie a situation in which the invested interest of the common stockholder would be substantially curtailed, if not terminated", and that such a situation exists "when there is no longer need to use the entire invested capital in the business, and a distribution of capital can be made." The brief

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* *Pennsylvania Edison Co.*, SEC , H. C. A. R. 8550 (Oct., 1948), aff'd 176 F. (2d) 764 (C. A. 3, 1949).

also stated that the phrase "distribution of capital" did not apply "where there is no shrinkage of capital employed in the business and what is paid out to the preferred is merely the proceeds of a new issue of securities sold for refunding purposes" since "to so hold would make the provision for a higher redemption price completely nugatory".* We are wholly in accord with the statements just quoted and submit that they are equally applicable here.

This Court held in the *Continental* case** that upon a distribution of capital the common law rule was that both common and preferred stockholders shared alike in the assets. If the Bond and Share preferred stockholders were in any danger of running afoul of the common law rule, they would be the first to claim the benefit of Section 3(b) of the charter upon a distribution of capital so that they would rank ahead of the common stockholders to the extent of $100 per share, plus accumulated dividends.*** The preferred stockholders should hardly expect the terms of Section 3(b) to work only in their favor.

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* The relevant portion of the brief of Commission counsel in the *Pennsylvania Edison* case is reproduced in detail in the Appendix hereto, pp. A-2, 3.

** *Continental Insurance Co.* v. *United States,* 259 U. S. 156 (1922).

*** Before the District Court our opponents cited *Colorado* v. *Great Western Sugar Co.*, 29 F. (2d) 810 (C. A. 8, 1928), in support of their contention that the phrase "any distribution of its capital" in Bond and Share's charter means no more and no less than total liquidation. That case is clearly distinguishable. Not only is the charter in that case different from the Bond and Share charter, but also the *Great Western* case did not involve any substantial contraction of assets as does the present case.

POINT IV.

The Commission, as affirmed by the District Court, improperly and inconsistently gave effect to the impact of the Act in making its investment value appraisal of the preferred stocks.

Bond and Share's principal assets at the time of the retirement of its preferred stocks consisted of its junior equity holdings in its five subholding companies. Consequently, the preferred stocks were junior not only to the senior securities of the subholding companies but also to all securities of the underlying operating companies. Moreover, all income from Bond and Share's junior equity holdings in the case of three of the subholding companies, i.e., Foreign Power, American and Electric, was barred by more than $200,000,000 of preferred stock dividend arrearages (R. 84, 98, 125).

As long as the quantity and quality of the earnings available to service the preferred stocks were affected by that situation, not even the witnesses for the preferred stockholders claimed that the investment value of the preferred stocks exceeded $100 a share. The problem was avoided by the Commission's assumption that reorganizations of Foreign Power, Electric and American (one of which has not yet been consummated and the other two of which were consummated only in 1949 and 1950, respectively) had been carried out by early 1947 pursuant to the Act (R. 69-71). This assumption had the effect of both eliminating Electric and American, as well as all their intervening securities, and also of wiping out the tremendous dividend arrearages on the preferred stocks of Foreign Power, American and Electric. If the Act had not been considered to apply, the evidence was clear that the three sub-

holding companies would not have been reorganized so as to dissolve these companies or to retire the substantial senior securities ahead of Bond and Share's junior holdings (R. 368-9).*

This Court in the *Engineers* case held that the Commission should determine the investment value of securities without reference to the "present liquidation or reorganization required by the Act."** The "present liquidation or reorganization" in the instant case is the substantial liquidation of the whole Bond and Share system (including the reorganizations of Foreign Power, American and Electric) pursuant to the Commission's mandatory orders in the consolidated proceedings involving the Bond and Share system. To give effect to the reorganizations of the three subholding companies, as the Commission did, was to violate the *Engineers* case rule and thereby to improve the character of the Bond and Share preferred stocks to the point where they no longer resembled the preferred stocks as they actually existed at the time of their retirement.

But if the Commission were right in giving effect to the impact of the Act in order to lay some basis for the assumption that Foreign Power, American and Electric had been reorganized as per the Commission's hypothesis, it could not then properly do an "about face" and incon-

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* Charts II and III included in the Appendix hereto illustrate the structures through which income from Bond and Share's junior equity holdings in American and Electric would have to flow before becoming available to Bond and Share for payment of dividends on its preferred stocks. Chart II shows such structures on the assumption that American and Electric (a) were not reorganized in any manner and (b) were reorganized without the aid of the Act (Transcript, unprinted, 3019-20). Chart III shows that such structures are substantially simplified and reduced in number on the assumption that American and Electric were reorganized pursuant to the Act on the hypothesis adopted by the Commission.

** *SEC* v. *Central-Illinois Corp.*, 338 U. S., 96, 140 (1949).

sistently refuse to recognize that the impact of the Act required Bond and Share to divest itself of a substantial portion of the securities (and, therefore, of the earnings from such securities) it would receive as a result of the three subholding company reorganizations. That, however, is what the Commission did and such action was affirmed by the District Court.

POINT V.

The Commission, as affirmed by the District Court, erred as a matter of law in basing its investment value appraisal on stock yield levels prevailing between November 1945 and March 1947, a period of abnormally high market values of a transient nature.

The Commission stated that its finding to the effect that the value of the $6 preferred stock equalled at least $110 per share was made "* * * in the light of the yield levels current during the period [between November 1945 and March 1947] that the preferred stocks were being severed from the enterprise * * *" (R. 80). This Court in the *Engineers* case stated that "the Commission would be wrong in selecting, as a basis for valuation, abnormal or highly speculative market values of a transient nature."*

The period between November 1945 and March 1947 represented just such a transient period of abnormally high market values for preferred stocks. This fact cannot be disputed and is clearly illustrated by one of the exhibits offered in evidence on behalf of the preferred stockholders.

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* *SEC* v. *Central-Illinois Corp.*, 338 U. S. 96, 146 (1949).

The exhibit, as brought down to date, appears in the Appendix attached hereto and is marked as Chart IV.*

Chart IV shows that in the twenty year period from the end of 1929 to the end of 1949, the all-time high peak of market prices of "all preferred stocks on the New York Stock Exchange" was reached between November 1945 and March 1947. During this period preferred stock prices were 44% higher than the average price for the period 1939-1949 and substantially higher than in the periods immediately preceding and following.

There were definite indications in the year 1946 and early in 1947, before the completion of the preferred stock retirement was effected (Bond and Share Ex. 146; R. 408), that preferred stock yields were sharply rising and preferred stock market prices were correspondingly sharply falling. The Commission wholly disregarded this evidence of prospective events which would have reduced the value of the Bond and Share preferred stocks, although, as we have stated above, it gave full effect to assumed future reorganizations of Bond and Share's three subholding companies, as prospective events which substantially increased the value of the preferred stocks.

Without arguing the point we would like to state our contention at this time, in order to reserve our right to

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* Chart IV is a reproduction of Jackson Ex. 8d with the curves representing the average price of all preferred stocks listed on the New York Stock Exchange and representing Electric Bond and Share common stock extended up to the end of 1949, the limit of the chart. A box enclosing the period November 1945 to March 1947, together with an accompanying statement, has been added to the exhibit. In computing the 44% average figure shown on the chart, average monthly prices were used for the period November 1945 to March 1947. For the entire period 1929-1949 an average price of the figures employed in plotting Jackson Ex. 8d was used.

request this Court to hear argument on the point later if the present petition is granted, that the findings of the Commission respecting the investment value of the $6 preferred stock are not supported by substantial evidence on consideration of the record as a whole in the light of this Court's recent opinion in *Universal Camera Corp.* v. *National Labor Relations Board,* unreported, Case No. 40, October 1950 Term, decided February 26, 1951.

POINT VI.

The Commission, as affirmed by the District Court, erred as a matter of law in directing that Bond and Share must pay interest with respect to the $6 preferred stock at the annual rate of 5.45% from March 6, 1947 to date of payment.

A.

Assuming *arguendo* that all our contentions in the previous points are incorrect, we submit that the Commission and the District Court erred in directing the payment of interest.

Interest at 5.45% per annum on the $8,400,000 which Bond and Share has been directed to pay with respect to the $6 preferred stock amounts to over $450,000 per year and has aggregated for the period from March 6, 1947 to March 31, 1951 more than $1,850,000.

The retirement of the preferred stocks having been completed in March 1947, Bond and Share filed its Plan II-B in April of that year and the case was presented to the Commission for decision in April of 1948. The Commission held the case under advisement until June 1950. During this period of approximately 2¼ years Bond and Share was

in no position to tender payment of any amount since there was no determination as to whether it owed anything to the preferred stockholders and if so, how much. Moreover, Bond and Share, during this period, was obliged to keep approximately $10,000,000 in liquid form so as to be in a position to meet any necessary payment with respect to the preferred stocks. The Company, therefore, did not have the use of the money during this period.

This Court has repeatedly announced that interest is given or withheld by the Courts in response to considerations of fairness.* It has also been established by this Court that interest should not commence to run until the principal amount involved in litigation is liquidated.**

In the light of the foregoing it would be grossly inequitable to require Bond and Share to pay any interest and we submit that the decisions of this Court just cited support such position.

B.

If any interest is legally payable, the interest rate should be substantially reduced below 5.45%. It may fairly be said that no substantial portion of the delay since March 1947 has been attributable to the common stockholders of Bond and Share. There is no equity, therefore, in obliging the common stockholders to bear the whole brunt of the delay by reimbursing the preferred stockholders at the unusually high rate of 5.45% for a period which already has extended to almost four years.

We have shown that Bond and Share has not been in a position, since its debt was not liquidated until entry of

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* *Board of County Commissioners* v. *United States*, 308 U. S. 343, 352 (1939); *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 165 (1946).

** *Mowry* v. *Whitney*, 81 U. S. 620, 653 (1871); *Duplate Corp.* v. *Triplex Co.*, 298 U. S. 448, 459 (1936); *Matter of Erlanger*, 237 N. Y. 159, 166, 142 N. E. 571 (1923).

the District Court order of March 2, 1951, to make tender of payment. Nor, for the reasons above stated, has Bond and Share had the use of the funds it has been obliged to hold in liquid form for the past several years.

Finally, after the contingent certificates were issued under Plan II-A to the preferred stockholders in March 1947, such holders no longer owned securities subject to the risk factors appurtenant to the formerly outstanding $6 preferred stock. Consequently, they were not entitled to interest at a yield rate which reflected such risk factors. The contingent certificates are in effect evidences of short-term contingent claims for cash against Bond and Share. Such claims with respect to the $6 preferred stock are subject to a maximum limit of approximately $8,400,000, being $10 per share (the redemption price ceiling) on 840,268 shares.

The risk factor on these contingent certificates is negligible. Indeed, if the asset value figures mentioned by the Commission in its findings in the instant case be taken as correct, the maximum claim of the certificates with respect to the $6 preferred stock would be covered approximately 25 to 45 times by such assets (R. 66-7). There is no argument of fairness that justifies paying to the holders of these "gilt-edged" certificates, free from any risk factor, interest computed upon yield rates applicable to preferred stock of the speculative investment caliber of Bond and Share's $6 preferred stock.

No question was raised before this Court in the *Engineers* case by the company or any common stockholder with respect to the fairness to the *common* stockholders of the payment of interest. This Court had before it for decision only the question of whether the interest allowed by the

Commission was sufficient in amount to be fair to the *preferred* stockholders, who attempted to claim substantial additional interest—even to the extent of seeking interest on the amount which had already been paid to them.*

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit and that a hearing upon and determination by this Court of the matters hereby presented be had.

Dated, April 25, 1951.

Respectfully submitted,

JOHN F. MACLANE,
Counsel for Petitioner.

SIMPSON THACHER & BARTLETT,
Of Counsel.

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* It should be added that in the *Engineers* case the amount to be placed in an escrow fund, which included a sum sufficient to cover the payment of interest on the $6 preferred stock at a 5.45% annual rate, had been determined early in the proceedings and that no objection was raised by anyone to such amount included for interest, as appears from the Commission's opinion (*Engineers Public Service Co.,* SEC , H. C. A. R. 7041 (Dec., 1946), p. 36).

APPENDIX.

Section 11(e).

Section 11(e) of the Public Utility Holding Company Act [15 U. S. C. 79k(e)] reads as follows:

> "Sec. 11(e). In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may so constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

Excerpt from brief submitted on behalf of Securities and Exchange Commission to United States Court of Appeals for the Third Circuit in *Pennsylvania Edison Company* case (H. C. A. R. 8550, aff'd 176 F. (2d) 764, C. A. 3, 1949).

In the *Pennsylvania Edison* case counsel for the Commission argued that the liquidation provision in the Pennsylvania Edison charter should not apply to a merger between Pennsylvania Edison and one of its associated companies and thus limit the amount of cash to be received by holders of preferred stock of Pennsylvania Edison upon the retirement of such stock in connection with the merger, which was carried out as a part of a Section 11(e) plan. In drawing a distinction between the redemption price and the lower liquidation price provided in the Pennsylvania Edison charter, Commission counsel stated in the Commission brief (dated May 1949, in Case No. 9859 at pp. 31-3) as follows:

> "* * * Although the lower liquidation price was intended to apply whether the 'liquidation' might be voluntary or involuntary, it obviously was not intended that voluntary liquidation, determinable by vote of the common stockholder alone, should serve as a cheaper alternative to redemption as a means of terminating the preferred stockholders' interest in the company while the common stockholder retains an undiminished interest. This is further illustrated by the detailed specification, in Section 3 of the by-laws, as to the kind of liquidation contemplated. The specified contingencies are (1) 'any liquidation or dissolution or winding up of the corporation,' (2) 'a sale of all or substantially all of the assets,' (3) 'any distribution of its capital.' Each of these contingencies contemplates at least prima facie a situation in which the investment interest of the common stockholder would be substantially curtailed, if not terminated (footnote omitted). That is what occurs when the business conducted by the company is wound up; when there is a sale in the usual arms-length sense to outside interests; or when there is

no longer need to use the entire invested capital in the business, and a distribution of capital can be made.*

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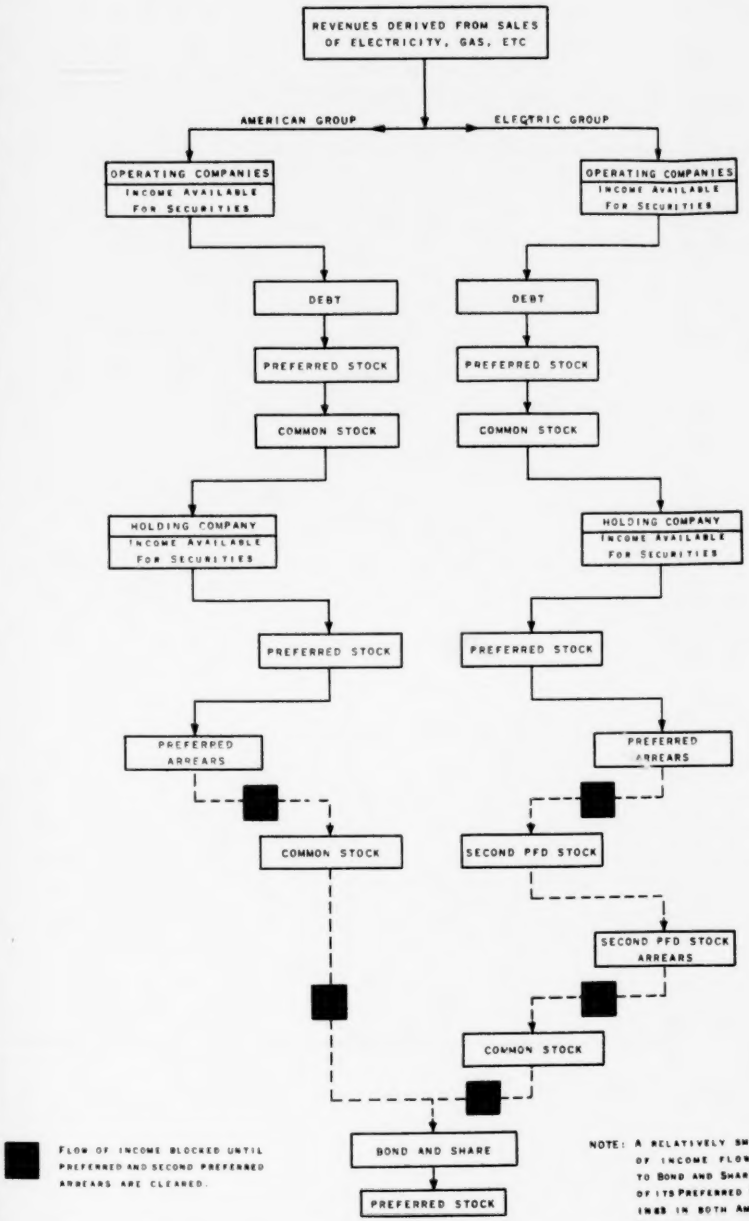
* "When preferred stock is retired there is, of course, a distribution of capital to the preferred. But obviously that is not what is meant by the by-law in question as applied to situations where there is no shrinkage in capital employed in the business and what is paid out to the preferred is merely the proceeds of a new issue of securities sold for refunding purposes. To so hold would make the provision for a higher redemption price completely nugatory."

STRUCTURES THROUGH WHICH INCOME OF AMERICAN AND ELECTRIC GROUPS MUST FLOW BEFORE BECOMING AVAILABLE FOR PAYMENT OF DIVIDENDS ON BOND AND SHARE PREFERRED STOCKS

ACTUAL AS OF DATE OF RETIREMENT AND
AS WOULD BE EX THE ACT



NOTE: A RELATIVELY SMALL AMOUNT OF INCOME FLOWS THROUGH TO BOND AND SHARE BY REASON OF ITS PREFERRED STOCK HOLDINGS IN BOTH AMERICAN AND ELECTRIC.

CHART I

STRUCTURES THROUGH WHICH INCOME OF AMERICAN AND ELECTRIC GROUPS MUST FLOW BEFORE BECOMING AVAILABLE FOR PAYMENT OF DIVIDENDS ON BOND AND SHARE PREFERRED STOCKS

AS REORGANIZED BY GRAHAM AND ACCEPTED BY SEC